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Commercializing Copyright – A Taxing Event for the Copyright Owner?

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With the ever-growing avenues to exploit copyrightable works, the copyright holders strive to exploit their copyright and copyrightable works through various modes to maximize the economic returns on their copyright and copyrightable works. Different methods of commercial exploitation of the copyright lead to taxable events both under direct taxes and indirect taxes. This paper attempts to broadly discuss the provisions relating to the taxation of income generated out of the exploitation of the economic rights of copyright holders/owners, including aspects of international taxation and GST, with the help of recent decisions. This paper, through its analysis, helps the readers to appreciate the balance achieved by the legislators in promoting the creation of intellectual works and revenue generation.

Keywords: Copyright, Economic Rights, Commercial Exploitation, Taxation, Royalty, Income, Income Tax, GST, Service Tax

From individuals to multinational corporations (MNCs), all have the potential to create works which are eligible for copyright protection. Be it software or a photograph taken by an amateur, all are protected under copyright. Thus, copyright is the legal protection provided to the creativity of individuals and legal persons, including MNCs. The owners of such copyright may either (a) retain the ownership; (b) license the copyright or copyrighted works; or (c) assign the copyright to third parties. While exploiting the economic rights conferred under Section 14 of the Copyright Act, 1957 (Copyright Act) the copyright holder reaps economic benefits. Such uses of the copyright by third parties usually generate income for the copyright owner in the form of license fee and/or royalties or assignment consideration. All such forms of transactions are then liable to tax.

The paper attempts to highlight the tax implications of commercializing copyright in India. To understand this clearly, this paper is divided into three parts. The first part explains the nature and meaning of copyright, including neighbouring rights, in brief. The second part enumerates the various provisions under which commercialization of copyright is taxable under the Income Tax Act, 1961, the Central Goods and Services Tax Act, 2017, and the international tax treaties. The third part of the paper analyses some of the issues that have recently come before the Indian Courts with respect to the taxation of certain copyright transactions, such as licensing of software, broadcasting, amongst others.

Nature and Meaning of Copyright

The Copyright Act governs the law related to copyright and neighbouring rights in India. According to Section 13 of the Copyright Act, copyright subsists in three classes of works: *firstly,* original literary[1], dramatic[2], musical[3] and artistic works[4]; *secondly* cinematograph films[5] and *lastly* sound recording.[6] Section 14 of the Copyright Act further provides the economic rights that are granted to the owners of the copyright. Generally, these economic rights consist of: the right to reproduction, right to make copies, right to communicate the work to the public, right to translation, right to adaptation amongst others.

The Copyright Act also lays down the law with respect to the ownership over the copyright. The general rule is that the author of the work is the owner of the copyright therein subject to certain exceptions, such as when work is created under a contract of service.[7] In relation to the work being cinematograph film or sound recording, the producer is the author, however, in relation to musical work, the composer is the author.[8] Another exception to the general rule is in the case of a photograph taken, or a painting or portrait drawn, or an engraving or a cinematograph film made,

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for valuable consideration at the instance of any person, such person is the considered the owner, unless there is an agreement to the contrary.[9] However, where a work is incorporated in a cinematograph film, the author will be considered the owner of the work, irrespective of the two mentioned exceptions that is where such work is made under an employment contract or at the instance of a person for valuable consideration.[10]

An owner of the copyright can assign the copyright in the work to any third party either wholly or partially; generally or specifically and for the whole term of the copyright or any part thereof.[11] Such assignment has to be in writing and must mention the amount of royalty and any other consideration payable to the author and legal heirs during the period of assignment.[12] Apart from an assignment, the owner of the copyright can grant any interest in the copyright by license in writing.[13] While granting a license, a copyright owner can authorize the licensee to do any of the acts mentioned in Section 14 of the Copyright Act and/or grant the licensee the right to use the copyrighted work.

The Copyright Act also provides a kind of secondary level protection as neighbouring rights, for the rights of broadcasting organization in relation to broadcasting of the works and of performers[14] in relation to performance.[15] The broadcast reproduction right, available to broadcasting organizations, includes the right to (a) rebroadcast the broadcast, (b) cause the broadcast to be heard or seen in public on payment, (c) make any sound or visual recordings of the broadcast, (d) make any reproduction of such recordings in certain cases, and (e) to sell or give on commercial rental or offer for sale or for such rental any such recordings referred in (c) and (d).[16]

Similarly, the performer's right, available to performers, includes the exclusive right to (a) make a sound or visual recording of the performance including the (i) reproducing thereof, (ii) issuance of copies of it, (iii) communication of it to the public, and (iv) selling or giving it on commercial rental or offer for sale or for commercial rental any copy of the recording; and (b) the broadcast or communicate the performance to the public.[17] However, it is pertinent to note that these two neigbouring rights are always subjected to the rights of the copyright holders' .[18]

The modes of exploiting the copyright works were just a handful in the past. Over a period of time, due to the advent of information and communication technologies along with internet have paved the way for numerous ways of exploitation. Therefore, it is necessary to determine the nature of the transaction between the copyright owner and the third party for determining and resolving the issues related to taxation of such transaction. In order to understand the issues pertaining to taxation of copyright works, the next part analyses the tax provisions.

Copyright and Taxation

The use of copyrighted work and the transfer of copyright in the works generate income for the copyright owner which is subject to income tax and such activities are a transaction which is subject to Goods and Services Tax (GST). In order to examine this, the relevant provisions of the Income Tax Act, 1961 (IT Act) and the Central Goods and Services Tax Act, 2017 (CGST Act) which impose a liability on the copyright owner for the commercialization of their copyright are discussed in detail.

Income Tax

Income tax is a direct tax levied under the IT Act on 'income'[19] earned in a Financial Year ("FY") (April 1 to March 31).[20] The scope of 'income' that is taxable in India under the IT Act is different for two categories of 'person'[21] in India – (1) a 'person' resident in India under the IT Act; and (2) a 'person' not a resident in India under the IT Act.[22] Varied rules are prescribed to determine the residential status of a 'person' (which *inter-alia* includes an individual, company and partnership firm).[23]

Worldwide' income' of a 'person' resident in India is subject to income tax in India under the IT Act. It includes all 'income' that (a) is received or is deemed to be received in India in such FY by or on behalf of such person; or(b) accrues or arises or is deemed to accrue or arise to such person in India during such FY; or(c)accrues or arises to such person outside India during such FY.[24] In case of a 'person' not a resident of India, only such 'income' that (a) is received or is deemed to be received in India in such FY by or on behalf of such person; or (b) accrues or arises or is deemed to accrue or arise to such person in India during the FY is subject to income tax in India under the IT Act.[25]

The 'income' is classified under five heads for the purpose of charge of income tax and computation of 'total income'[26] under the IT Act: (a) Salaries; (b) Income from house property; (c) Profits and gains of business or profession (PGBP); (d) Capital gains; and (e) Income from other sources (IoS). Broadly,

income from the commercialization of a copyright can be generated in two ways: (i) Licensing of copyright, or (ii) Assignment of copyright.

Licensing of Copyright

A 'Person' Resident of India

The 'income' arising to a 'person' from licensing of copyright may be taxable under the head either (a) PGBP, or (b) IoS. The profits and gains of any 'business' or 'profession' which is carried on by a taxpayer at any time during the FY is chargeable to income tax under the head PGBP as per the IT Act. The term 'profession' is generally *"associated with the exercise of intellectual or technical equipment resulting from learning or service"*.[27] It involves *"occupation requiring purely intellectual or manual skill"* .[28]

The term 'business' is inclusively defined to include any 'trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture'.[29] The term indicates an 'activity carried on continuously in an organized manner with a set purpose and with a view to earn profit'.[30] It denotes *'continuous and systematic exercise of an occupation or profession with the object of making income or profit'*.[31] The word 'business' connotes *'some real, substantial and systematic or organised course of activity or conduct with a set purpose'*.[32] Accordingly, when licensing of copyright qualifies as the 'business' of a 'person', the profits derived from such 'business' is chargeable to income tax under the head PGBP. These profits are computed in accordance with the provision in Section 30 to Section 43D of the IT Act.

An expenditure, not in the nature of capital expenditure (or personal expenses of the taxpayer), which is laid out or expended wholly and exclusively for the purposes of the 'business' is allowed as deduction in computing the income chargeable under the head PGBP.[33] Further, 25% of the 'written down value'[34] of a copyright acquired on or after 1st April 1998 by a taxpayer and used for the purposes of the 'business', forming part of a 'block of assets'[35], is allowed as a deduction in computing the income chargeable under the head PGBP.[36]

In case 'income' arising to a 'person' from licensing of copyright is not connected with the 'business', if any, carried out by the taxpayer, such 'income' is chargeable to income tax under the head IoS.[37] Any expenditure (not in the nature of capital expenditure) laid out or expended wholly and exclusively for the purpose of making or earning such 'income' is allowed as a deduction in computing' income' chargeable to income tax under the head IoS.[38]

A 'person', not being an individual or a Hindu undivided family, responsible for paying to a resident 'person' any sum by way of 'royalty' is required to deduct tax at either (a) 2% of the sum where such 'royalty' is in the nature of consideration for the sale, distribution or exhibition of cinematographic films or (b) 10% of the sum, in any other case.[39]

The term 'royalty' means consideration for, *inter-alia*, (a) the transfer of all or any rights (including the granting of a license) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting; and (b) the rendering of any services in connection with the activities referred to in (a). It includes any lump sum consideration but excludes any consideration which is chargeable to income tax in under the head' Capital gains' in the hands of the recipient of such consideration.[40]

Interestingly, until 2020, the considerations for the sale, distribution or exhibition of cinematographic films were excluded from the scope of the term 'royalty' under the IT Act.

The Finance Act 2020 to the IT Act, removed this exclusion and currently, such consideration for cinematographic films payable by a resident 'person' to a non-resident 'person' qualifies as 'royalty' and therefore, it is subject to income tax in India under the IT Act. The Explanatory Memorandum to the amendment provided the following rationale:

> *"Due to exclusion of consideration for the sale, distribution or exhibition of cinematographic films from the definition of royalty, such royalty is not taxable in India even if the DTAA gives India the right to tax such royalty. Such a situation is discriminatory against Indian residents, since India is foregoing its right to tax royalty in case of a non-resident from another country without that other country offering similar concession to Indian resident. Hence, it is proposed to amend the definition of royalty so as not to exclude consideration for the sale, distribution or exhibition of cinematographic films from its meaning." [Emphasis supplied]*

Deductions specified in Sections 80C to 80U of the IT Act are allowed from the 'gross total income'41 in computing the 'total income' of a taxpayer.[42] There is

a specific deduction available to authors in computing' total income' under the IT Act.

According to Section 80QQB of the IT Act, where the 'gross total income' of an author, being an individual resident in India, includes an 'income', derived in the exercise of 'profession', on account of (a) any lump sum consideration for the assignment or grant of any of his interests in the copyright of any 'book' being a work of literary, artistic or scientific nature, or (b) 'royalty' or copyright fees (whether receivable in lump sum or otherwise) in respect of such 'book', a deduction equal to the whole of such 'income', or an amount of INR 3,00,000, whichever is less, is allowed in computing the 'total income' of such author.

It is further provided that where 'income' by way of such 'royalty or the copyright fee, is not a lump sum[43] consideration for all rights of the author in the 'book', so much of the income (before allowing expenses attributable to such income) which is in excess of 15% of the value of the 'book' sold during the relevant FY shall be ignored.[44] For the purposes of Section 80QQB of the IT Act, no definition of the term 'book' is provided, however, certain exclusions[45] not qualifying as 'book' are provided.

A 'Person' not a Resident of India

In case of a 'person' not a resident of India, 'income' that is deemed to accrue or arise to such person in India during the FY is subject to income tax in India under the IT Act. As per Section 9(1)(vi) of the IT Act, the 'income' by way of 'royalty' is deemed to accrue or arise in India, when it is payable by:

a. the Indian Government; or
b. a 'person' who is a resident in India, excluding the case where the 'royalty' is payable in respect of any right, property or information used or services utilized for the purposes of a 'business' or 'profession' carried on by such 'person' outside India or for the purposes of making or earning any 'income' from any source outside India; or
c. a 'person' who is not a resident in India, where the 'royalty' is payable in respect of any right, property or information used or services utilized for the purposes of a 'business' or 'profession' carried on by such 'person' in India or for the purposes of making or earning any 'income' from any source in India.

The IT Act provides a concessional income tax regime for the 'income' by way of 'royalty' earned by a 'person' not a resident in India, in pursuance of an agreement made with the Indian Government or an Indian concern after 31st March 1976, and in case of the agreement with an Indian concern, either the agreement is approved by the Central Government or the agreement is in accordance with the industrial policy of the Indian Government, where the agreement relates to a matter included in the industrial policy.[46] On qualification of these conditions, the 'income' by way of 'royalty' will be subject to income tax at 10%[47], as against the standard rate of 30%[47] to 40%[47], depending on the type of 'person' earning such 'income'.

It is worth to note here that the above-mentioned concessional income tax regime is not applicable where (a) the 'royalty' income from the Indian Government or an Indian concern is received under an agreement entered into with the non-resident after 31st March 2003, (b) where the non-resident carries on business in India through a 'permanent establishment'[48] in India, or performs professional services from a fixed place of profession situated in India and (b) the right, property or contract in respect of which the 'royalty' is paid is effectively connected with the 'permanent establishment' or fixed place of profession. In such a case, a special mechanism[49] is provided for taxation of such 'royalty' income under the IT Act.

India has entered into Double Taxation Avoidance Agreement (Tax Treaty) with various countries. The provisions of the IT Act or the respective Tax Treaty, whichever are more beneficial, are applicable to the taxpayer.[50]

Assignment of Copyright

Any profits or gains arising from 'transfer' of a 'capital asset' is chargeable to income tax under the head' Capital gains'.The 'income' chargeable to income tax under the head 'Capital Gains' is computed by deducting from the 'full value of consideration' received upon 'transfer' (a) expenditure incurred wholly and exclusively in connection with such transfer, and (b) the 'cost of acquisition' of the 'capital asset' and the 'cost of any improvement' thereto.[51]

The term' capital asset' is defined as a property of any kind held by a taxpayer whether or not connected with taxpayer's 'business' or 'profession' and it excludes, *inter-alia*, any 'stock-in-trade' held for the purpose of 'business' or 'profession'.[52] Given a wide definition of 'capital asset' in the IT Act, a copyright owned by a taxpayer can qualify as a 'capital asset', unless it qualifies as 'stock-in-trade'[53] of the taxpayer.

The term 'transfer' in relation to a 'capital asset' has also been defined inclusively in the IT Act.[54] It includes, *inter-alia,* (a) the sale, exchange or relinquishment of the asset, and (b) the extinguishment of any rights therein.Where the 'capital asset', being a copyright, is held for a period of more than 36 months preceding the date of 'transfer', such' capital asset' is considered as a 'long-term capital asset', else it is considered as a 'short term capital asset'.[55]

In case of 'transfer' of 'long-term capital asset' by a 'person', indexation benefit is available for the 'cost of acquisition' and 'cost of improvement'.[56] Indexation benefit for the 'cost of acquisition' refers to stepping up of the 'cost of acquisition' amount based on the ratio of the Cost Inflation Index[57] between the year of 'transfer', and either (a) the first year in which such 'capital asset' was held by the taxpayer or (b) the year beginning on 1st April 2001, whichever is later.[58] Indexation benefit for the 'cost of improvement' refers to stepping up of the 'cost of improvement' amount based on the ratio of the Cost Inflation Index between the year of 'transfer', and the year in which the improvement to the 'capital asset' took place.[59] Further, the 'transfer' of a 'long-term capital asset' is subject to concessional income tax at 20%[60], while 'transfer' of a 'short-term capital asset' is subject to income tax at the rate prescribed depending on the type of 'person' transferring such 'short-term capital asset'.

The term 'cost of acquisition' has not been defined in the IT Act. However, it has been a subject matter of various judicial decisions. In *CIT* v *Trikamlal Maneklal (HUF)* [61]:

> *"Capital gains tax is thus levied on the profit or gain that arises on the transfer of a capital asset. This, ordinarily, is the actual profit or gain. It is to be computed by deducting from the consideration received on the sale of the capital asset, inter alia, the cost of its acquisition. Ordinarily, it is the actual cost of acquisition that has to be taken into account……. In the context of Sections 45 and 48 of the Income-tax Act, 1961, what is required to be considered is the actual cost of acquisition of the capital asset by the assessee. It cannot be calculated on any notional basis, except in the circumstances mentioned in Sections 49 and 55 of the said Act. The notional basis which is employed for the purposes of calculating the cost of acquisition for the purposes of a claim for depreciation has no application in the context of the computation of capital gains."[Emphasis supplied]*

Accordingly, unless a cost on notional basis has been prescribed in the IT Act, the actual cost incurred for acquisition of the 'capital asset' is considered as the 'cost of acquisition', where the copyright is purchased by the taxpayer. However, in case of a self-generated copyright by the taxpayer, the 'cost of acquisition' for the purposes of computing the 'income' chargeable to income tax under the head 'Capital Gains' is nil. Please note that a special mechanism[62], to compute 'income' chargeable to income tax under the head 'Capital Gains', is applicable where the 'capital asset', such as a copyright, form part of a 'block of assets' in respect of which depreciation has been allowed under the IT Act, that is such 'capital asset' is used for the purpose of business. As mentioned above, consideration which is chargeable to income tax in under the head' Capital gains' in the hands of the recipient of such consideration is excluded from chargeability of income tax as 'royalty'.[63]

Goods and Services Tax

The taxable event under GST laws[64] is 'supply'[65] of 'goods' or 'services'. The following transactions fall under the scope of 'supply'[66]:

a. *"all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;*
b. *the activities or transactions, by a person, other than an individual, to its members or constituents or vice-versa, for cash, deferred payment or other valuable consideration;*
c. *import of services for a consideration whether or not in the course or furtherance of business;*
d. *the activities specified in Schedule I, made or agreed to be made without a consideration."*

The term 'goods' means "every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply".[67]

The term 'services' means "anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or

denomination to another form, currency, or denomination for which a separate consideration is charged".[68]

Certain transactions are specified to be treated either as 'supply' of 'goods' or 'supply' of 'services', where such transaction constitutes a 'supply'.[69] A temporary transfer or permitting the use or enjoyment of any intellectual property right is treated as 'supply' of 'services'.[70]

A permanent transfer of Intellectual Property Right is considered as 'supply' of 'goods' is subjected to GST at the rate of 18%.[71] A temporary or permanent transfer or permitting the use or enjoyment of Intellectual Property right, considered as 'supply' of 'services', is also subjected to GST at the rate of 18%.[72] Given that a 'permanent transfer' is being considered both as 'supply' of 'goods' or 'supply' of 'services', the classification of assignment of copyright is still an open question pending consideration by the courts.[73]

However, it is worth to note here that though the Central Government in the exercise of its power in Section 93 of the Finance Act, 1994, had exempted[74] certain specified services relating to copyright from the levy of service tax. This exemption is not continued in the GST regime.

Issues in Copyright and Taxation: A Judicial Discourse

Income Tax Implications on Licensing of a Copyrighted Work, Being Computer Software

A 'computer software' is defined as *"any computer programme recorded on any disc, tape, perforated media or other information storage device and includes any such programme or any customised electronic data"*.[75] The term 'computer programme' is defined in Copyright Act as *"set of instructions expressed in words, codes, schemes or in any other form, including a machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result"*.[76]

As discussed above, the term 'royalty' has been specifically defined in the IT Act.[77] For the purpose of the definition, a clarification in the IT Act is included regarding 'computer software'. It provides that *"the transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use a computer software (including granting of a license) irrespective of the medium through which such right is transferred"*.[78] [*Emphasis supplied*]

This clarification was inserted by way of Finance Act, 2012 in the IT Act and was made retrospectively applicable from 1 June 1976.This clarification in the IT Act resulted in the expansion of the term 'royalty' and accordingly, a consideration for transfer of all or any right for use or right to use a 'computer software' is considered as 'royalty' under the IT Act, irrespective of a right being granted only a to copyrighted work and not the copyright *per se*. Accordingly, a consideration earned by a 'person' for granting an end user license of a software under an End-User License Agreement to a consumer is 'royalty' for the purposes of the IT Act.

As mentioned above, a person not a tax resident in India is entitled to benefits under the Tax Treaty i.e., the provisions of the IT Act or the respective Tax Treaty, whichever are more beneficial to the taxpayer are applicable.[79] Given this expansion of scope of the term 'royalty' is taxable under the IT Act and not under the definition of the term 'royalty' in the bilateral Tax Treaties by India with foreign countries, consideration earned by a non-resident 'person' for granting an end user license is not taxable in India, on availing the benefit under the Tax Treaty. This position was specifically reiterated by the Hon'ble Supreme Court in *Engineering Analysis Centre of Excellence (P) Ltd.* v *CIT*[80] wherein a resident 'person' was held to be not obligated to withhold income tax under Section 195 of the IT Act, given the consideration paid to non-residents didn't qualify as 'royalty' under the respective Tax Treaties of the Appellants and therefore, such consideration was not subject to income tax in India.

The Hon'ble Supreme Court in *Engineering Analysis* was concerned with the following four categories of transactions for analysing the qualification of consideration paid as 'royalty' under the respective Tax Treaties:

a. Purchase of 'computer software' directly from a foreign, non-resident supplier or manufacturer by end-users, resident in India;

b. Purchase of 'computer software' from a foreign, non-resident supplier or manufacturer by distributors or resellers, resident in India for further reselling to end-users, resident in India;

c. Purchase of 'computer software' from a foreign, non-resident distributor (who purchased 'computer software' from a foreign, non-resident seller) by distributors or end-users, resident in India; and

d. Purchase of an integrated unit/equipment (wherein 'computer software' is affixed onto hardware) from foreign, non-resident supplier by distributors or end-users, resident in India.

After analysing the existing law related to treating the income generated by the sale of 'computer software' and the transfer of the copyright therein, the Hon'ble Supreme Court provided the following rationale on the difference between license of copyright and copyrighted work:

"128.2.Copyright is an intangible, incorporeal right, in the nature of a privilege, which is quite independent of any material substance. Ownership of copyright in a work is different from the ownership of the physical material in which the copyrighted work may happen to be embodied. An obvious example is the purchaser of a book or a CD/DVD, who becomes the owner of the physical article, but does not become the owner of the copyright inherent in the work, such copyright remaining exclusively with the owner.

128.3. Parting with copyright entails parting with the right to do any of the acts mentioned in Section 14 of the Copyright Act. The transfer of the material substance does not, of itself, serve to transfer the copyright therein. The transfer of the ownership of the physical substance, in which copyright subsists, gives the purchaser the right to do with it whatever he pleases, except the right to reproduce the same and issue it to the public, unless such copies are already in circulation, and the other acts mentioned in Section 14 of the Copyright Act.

128.4.A license from a copyright owner, conferring no proprietary interest on the licensee, does not entail parting with any copyright, and is different from a license issued under Section 30 of the Copyright Act, which is a license which grants the licensee an interest in the rights mentioned in Sections 14(a) and 14(b) of the Copyright Act. Where the core of a transaction is to authorize the end-user to have access to and make use of the "licensed" computer software product over which the licensee has no exclusive rights, no copyright is parted with and consequently, no infringement takes place, as is recognized by Section 52(1)(a a) of the Copyright Act. It makes no difference whether the end-user is enabled to use computer software that is customized to its specifications or otherwise.

128.5. A non-exclusive, non-transferable license, merely enabling the use of a copyrighted product, is in the nature of restrictive conditions which are ancillary to such use, and cannot be construed as a license to enjoy all or any of the enumerated rights mentioned in Section 14 of the Copyright Act, or create any interest in any such rights so as to attract Section 30 of the Copyright Act.

128.6.The right to reproduce and the right to use computer software are distinct and separate rights, as has been recognized in SBI v *Collector of Customs [SBI* v *Collector of Customs, (2000) 1 SCC 727] (see para 21), the former amounting to parting with copyright and the latter, in the context of non-exclusive EULAs, not being so."*

From a reading of the decision of the Hon'ble Supreme Court, it is evident that the consideration paid by the user for the use of the 'computer software' cannot be considered as 'royalty' as the end user is only getting the right to use the copyrighted work and there is no transfer of right to use the copyright as envisaged in Section 14 of the Copyright Act. It is pertinent to mention that this non-qualification of consideration paid for licensing use of 'computer software' as 'royalty' is applicable only in case of non-residents availing benefit under the Tax Treaties (wherein the term 'royalty' is specifically defined).[81] However, in case of no benefit available to a non-resident taxpayer under the Tax Treaty, the consideration paid for licensing use of 'computer software' will qualify as 'royalty' under the IT Act, given the expansive clarification provided for the term 'royalty' under the IT Act. However, it is worth mentioning that that the Income Tax Department has filed a review petition against the *Engineering Analysis* decision before the Hon'ble Supreme Court and the same is pending as on date.[82]

Databases

Different judicial and quasi-judicial authorities for in India have grappled with the question of considering the income earned from the subscription of online databases as 'royalty' or 'fees for technical services'. To understand the legal implications of the said issue, it is important to look at the definition of literary work under the Copyright Act and the definition of royalty under the IT Act.

According to the definition of literary work under the Copyright Act, a database is covered under the same. Hence, an original database is liable for copyright protection. While the general definition of royalty means "*payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary work".* The question that has arisen in most of the cases in India is whether the payment made for the subscription to a database can fall under the definition of royalty, specifically as *a payment of any kind received as a consideration for the use of any copyright*.[83]

In *Factset Research Systems Inc.,*[84] and *Dun & Bradstreet Espana, S.A.,*[85] the Authority for Advance Ruling (AAR) held that the data published by the databases was data that was available in the public domain. Hence, the assessee merely compiled the data and provided the information to the public at large. Thus, the amount paid for the subscription to the databases could not be considered as 'royalty'.

The Income Tax Appellate Tribunal, Mumbai bench in *Elsevier Information Systems GmbH*[86] was considering whether the subscription fee earned by a tax resident of Germany for providing access to articles related to the subject of chemistry could be considered as royalty. The ITAT held observed that *firstly* the assessee had granted a non-exclusive and non-transferrable right to the customer to access and use the online database; *secondly* the customer was restricted to modify, translate or create any derivative work based on the work available on the online database; *thirdly* the customer could only make copies or store the electronic record for their exclusive use and not for commercial purposes and *lastly,* the assessee had retained all the rights, title and interest in the online database with itself. Thus, the ITAT held that the assessee had not transferred use or right to use the copyright of literary work and merely allowed the customers to access the database and use the information for their own use. Therefore, the subscription fee paid by the customers to the assessee could not be considered as 'royalty'.

Thus, as is evident, the subscription fee paid for accessing online databases will not be considered as royalty as long as the assessee is not transferring the right to use the copyrighted literary work. The main question that the courts will need to consider while deciding these cases is whether the assessee is providing access to copyrighted material or is permitting the consumer the use of copyright.[87]

Broadcasting

As was mentioned above, the Copyright Act also provides for broadcast reproduction rights. The broadcast of sporting events in India is a major source of revenue for broadcasters. Generally, the organiser of the sports event (for example BCCI) enters into licensing agreements with broadcasters (for example with Star India Pvt Ltd for the Indian Premier League) to broadcast the event. The issue that majorly arises with the taxation of the consideration paid under the license agreement is whether the same can be considered as 'royalty' as the right to broadcast is provided under the Copyright Act.

As is evident, the Copyright Act provides two sets of rights which are independent of each other and can coexist – the copyright and the neighbouring rights (broadcast reproduction right and the performer's right).The Courts and tribunals in India have held that a live event does not fall under the definition of 'work' and thus, is not liable for protection under Copyright Act because such information is essentially facts occurring against the public at large and do not consist of limited or minimum creativity.[88] Since a cricket match is a live event, there can be no copyright in the said match. In the absence of any copyright protection of the cricket match, there cannot be any transfer of copyright in the said match to the broadcaster. Therefore, any license fee paid by the broadcaster to the organizer of the event cannot be considered 'royalty'.[89]

GST Implications in Case of Musician

In the previous paper which focused on the musical works *vis-a-vis* service tax issues,[90] the authors have discussed the issues at length and breadth about the ongoing dispute in the Madras High Court wherein AR Rahman has filed a case against the order of the Commissioner of GST and Central Excise. The Commissioner had held AR Rahman liable for paying service tax and penalty for not paying the service tax on time on the following alleged services provided by him: (1) composition, arranging, recording, and directing of songs/music for movies at the behest of the producer and as per the requirement of the director; (2) conducting live concerts in India and outside India; and (3) royalties received for public performances of A.R. Rahman's work and collected through the Indian Performing Right Society Limited (IPRS).

As the issues of service tax on the creation of original musical work and its subsequent incorporation in a cinematograph film have been dealt

in the same, the only issues reaming are related to AR Rahman's performance in live concerts and the royalty accruing out of public performances of his works through IPRS.

AR Rahman by conducting live concerts in India and outside India, irrespective of which songs he is performing, is merely professing his profession, that of a singer. Thus, the consideration received by AR Rahman for performing in these concerts, in the opinion of the authors ought not to be subject to service tax or GST since he is merely exploiting his exclusive rights under Section 14(a)(iii) of the Copyright Act (i.e., performance of the work in public).

With respect to the third kind of service, AR Rahman's works are exploited by others for which royalty is collected through IPRS. It is a temporary transfer of the rights enshrined under Section 14 of the Act. Thus, AR Rahman may be liable for tax under GST. However, these issues are yet to be adjudicated by the Madras High Court.

Conclusion

This paper attempts to broadly touch upon the inter-play between the commercialization of copyright and its taxation. The IT Act provides a deduction under Section 80QQB for the income earned from copyright subject to a threshold limit and other conditions specified therein. This is a reflection of the intention of the Government to promote intellectual works. However, unlike service tax wherein specific exemptions for IPR were present, GST fails to provide any favorable regime for the promotion of copyrightable works. Also, certain latest judgments have decided the controversial issues in the interpretation of taxation provisions in favour of the copyright holders. Though a copyright transaction is subjected to the vigour of both direct and indirect taxes at the same point of time, the Government has tried to strike a balance between the incentivizing creation of original works and adding a tax burden on such authors by providing special regimes for the copyright works to protect and promote the interest of the copyright holder at least in the direct tax regime. Similar tax incentives should be extended under the GST regime also to not only promote the creative efforts, but also favour the general public to access the copyright works from the original sources which will address the issue of piracy too.

References

1 Section 2(o) of the Copyright Act, 1957.
2 Section 2(h) of the Copyright Act, 1957.
3 Section 2(p) of the Copyright Act, 1957.
4 Section 2(c) of the Copyright Act, 1957.
5 Section 2(f) of the Copyright Act, 1957.
6 Section 2(xx) of the Copyright Act, 1957.
7 Clause (a) read with clause (c) of the proviso to Section 17 of the Copyright Act, 1957.
8 Section 2(d) of the Copyright Act, 1957.
9 Clause (b) of the proviso to Section 17 of the Copyright Act, 1957.
10 Second proviso to Section 17 of the Copyright Act, 1957.
11 Section 18 of the Copyright Act, 1957.
12 Section 19 of the Copyright Act, 1957.
13 Section 30 of the Copyright Act, 1957.
14 Section 2(qq) of the Copyright Act, 1957.
15 Section 2(q) of the Copyright Act, 1957.
16 Section 37 the Copyright Act, 1957.
17 Sections 38 and 38A of the Copyright Act, 1957.
18 Section 39A of the Copyright Act, 1957.
19 Section 2(24) of the IT Act, 1961.
20 Section 4 of the IT Act, 1961.
21 Section 2(31) of the IT Act, 1961.
22 Section 5 of the IT Act, 1961.
23 Section 6 of the IT Act, 1961.For instance: A company is a resident in India under the IT Act in a FY when either (a) it is an 'Indian company'; or (b) its 'place of effective management' The phrase 'place of effective management" means 'a place where key management and commercial decisions that are necessary for the conduct of business of an entity as a whole are, in substance made'.
24 Section 5(1) of the IT Act, 1961.
25 Section 5(2) of the IT Act, 1961.
26 Section 2(45) of the IT Act, 1961.
27 *CIT* v *Bhagwan Broker Agency* [1995] 212 ITR 133 (Rajasthan).
28 *CIT* v *Manmohan Das* [1966] 59 ITR 699 (SC).
29 Section 2(13) of the IT Act, 1961.
30 *Karnani Properties Ltd* v *CIT*, [1971] 82 ITR 547 (SC) followed in *CIT* v *M.P. Bazaz,* [1993] 200 ITR 131.
31 *Lala Indra Sen*, In re, (1940) 8 ITR 187 (All)
32 *Narain Swadeshi Weaving Mills* v *CEPT*, (1954) 26 ITR 765 (SC).
33 Section 37(1) of the IT Act, 1961.
34 Section 43(6)(c) of the IT Act, 1961.
35 Section 2(11) of the IT Act, 1961.It means a group of assets falling within a class of assets comprising either (a) tangible assets, or (b) intangible assets, being know-how, patents, copyrights, trademarks, licenses, franchises or any other business or commercial rights of similar nature, not being goodwill of a business or profession, in respect of which the same percentage of depreciation is prescribed.
36 Section 32(1)(ii) of the IT Act read with Rule 5(1) of the Income Tax Rules, 1962 ("IT Rules") and Part B of Appendix I of IT Rules.
37 Section 56(1) of the IT Act, 1961.
38 Section 57(iii) of the IT Act, 1961.
39 Section 194J(1) of the IT Act, 1961.
40 Explanation 2 to Section 9(1)(vi) of the IT Act, 1961.
41 Section 80B(5) of the IT Act, 1961.It means 'the total income computed in accordance with the provisions of this Act, before making any deduction' under Chapter VIA of the IT Act, 1961.

42 Section 80A(1) of the IT Act, 1961.

43 As per Explanation (d) to Section 80QQB of the IT Act, lump sum, "in regard to royalties or copyright fees, includes an advance payment on account of such royalties or copyright fees which is not returnable".

44 First proviso to Section 80QQB(2) of the IT Act, 1961.

45 Explanation (b) to Section 80QQB of the IT Act. 1961 – 'brochures, commentaries, diaries, guides, journals, magazines, newspapers, pamphlets, text-books for schools, tracts and other publications of similar nature, by whatever name called'

46 Section 115A(1)(b) of the IT Act, 1961.

47 Plus applicable surcharge and cess

48 As per Explanation (c) to Section 44DA of the IT Act, the term 'permanent establishment' is defined to include "a fixed place of business through which the business of the enterprise is wholly or partly carried on".

49 Section 44DA of the IT Act, 1961.

50 Section 90(2) of the IT Act, 1961.

51 Section 48(1) of the IT Act, 1961.

52 Section 2(14) of the IT Act, 1961.

53 As per *H. Mohmed & Co.* v *CIT* [1977] 107 ITR 637 (Gujarat), a' stock-in-trade' is "something in which a trader or a businessman deals; whereas his capital asset is something with which he deals. It is possible that one and the same commodity may in the case of one assessee be his stock-in-trade, whereas in the case of another assessee it may be his capital asset.For example, in the case of an assessee who carries on the business of buying and selling land, land may be his stock-in-trade but in the case of an assessee who has invested his savings in land and gets income from the land or the structures put up on the land, the land is his capital asset. Therefore, one of the indications for deciding as to what is stock in-trade is whether a particular assessee is buying or selling the commodity or whether he has merely invested his amount with a view to earn further income or with a view to carry on his other business. It may be pointed out that 'trade' means that particular business activity where the person engaged in the profession buys or sells. All businesses may be carried on for the purpose of earning a profit but that particular kind of business where the businessman buys and sells a commodity can only be designated as 'trade'." [Emphasis supplied]

54 Section 2(47) of the IT Act, 1961.

55 Section 2(42A) of the IT Act, 1961.

56 Second proviso to Section 48 of the IT Act, 1961.

57 Index notified by the Central Government in the Official Gazette (having regard to 75% of average rise in the Consumer Price Index (urban)) as per Clauses (v) of the Explanation to Section 48 of the IT Act, 1961.

58 Clauses (iii) of the Explanation to Section 48 of the IT Act, 1961.

59 Clauses (iv) of the Explanation to Section 48 of the IT Act, 1961.

60 Plus applicable surcharge and cess. Section 112(1) of the IT Act, 1961.

61 [1987] 168 ITR 733 (Bombay).

62 Section 50 of the IT Act, 1961.

63 Explanation 2 to Section 9(1)(vi) of the IT Act, 1961.

64 'GST laws collectively refers CGST Act and Integrated Goods and Services Tax Act, 2017 ("IGST Act").

65 Section 9(1) of the CGST Act and Section 5(1) of the IGST Act, 2017

66 Section 7(1) of the CGST Act, 2017

67 Section 2(52) of the CGST Act, 2017

68 Section 2(102) of the CGST Act, 2017

69 Schedule II to the CGST Act, 2017

70 Entry 5(c) of Schedule II to the CGST Act, 2017

71 Serial No. 452P of Notification No. 1/2017 Central Tax (Rate), dated 28-6-2017 read with Notification No. 13/2021 Central Tax (Rate), dated 27-10-2021.

72 Serial No. 17 item (ii) of Notification No. 11/2017 Central Tax (Rate) dated 28-6-2017 read with Notification No. 6/2021 Central Tax (Rate), dated 30-9-2021.

73 *USV (P.) Ltd.*, In re, [2021] 133 taxmann.com 296 (AAR - MAHARASHTRA), the question of classification of transfer of registered trademarks as either supply of goods or supply of services under GST law was raised. However, based on the certain procedural the application for advance ruling was rejected as being not maintainable under section 95 of CGST Act.

74 Notification No. 25/2012-ST, dated 20-6-2012 as amended by Notification No. 3/2013-ST, dated 1 March 2013.The relevant extract is "15. Services provided by way of temporary transfer or permitting the use or enjoyment of a copyright – (a) covered under clause (a) of sub-section (1) of Section 13 of the Copyright Act, 1957 (14 of 1957), relating to original literary, dramatic, musical or artistic works; or (b) of cinematograph films for exhibition in a cinema hall or cinema theatre;"

75 Explanation 3 to Section 9(1)(vi) of the IT Act, 1961.

76 Section 2(ffc) of the Copyright Act.

77 Explanation 2 to Section 9(1)(vi) of the IT Act, 1961.

78 Explanation 4 to Section 9(1)(vi) of the IT Act, 1961.

79 Section 90(2) of the IT Act, 1961.

80 (2022) 3 SCC 321.

81 The extract of the relevant paragraphs is "180. Given the definition of "royalties" contained in Article 12 of the DTAAs mentioned in Para 46 of this judgment, it is clear that there is no obligation on the persons mentioned in Section 195 of the Income Tax Act to deduct tax at source, as the distribution agreements/EULAs in the facts of these cases do not create any interest or right in such distributors/end-users, which would amount to the use of or right to use any copyright. The provisions contained in the Income Tax Act [Section 9(1)(vi), along with Explanations 2 and 4 thereof], which deal with royalty, not being more beneficial to the assessees, have no application in the facts of these cases.181.Our answer to the question posed before us, is that the amounts paid by resident Indian end-users/distributors to non-resident computer software manufacturers/suppliers, as consideration for the resale/use of the computer software through EULAs/distribution agreements, is not the payment of royalty for the use of copyright in the computer software, and that the same does not give rise to any income taxable in India, as a result of which the persons referred to in Section 195 of the Income Tax Act were not liable to deduct any TDS under Section 195 of the Income Tax Act. The answer to this question will apply to all four categories of cases enumerated by us in Para 3 of this judgment."

82 *Commissioner of Income Tax International Taxation & Anr* v *Engineering Analysis Centre of Excellence Pvt Ltd*, RP(C) 1422/2021.

83 Rajgopalan Ganesh CA, *Taxation of Copyright Royalties in India: Interplay of Copyright Law and Income Tax*, Oak Bridge Publishing Pvt Ltd, Gurugram (2019).

84 In re [2009] 182 Taxman 268 (AAR)

85 In re [2005] 142 Taxman 284 (AAR) (thereafter affirmed by Hon'ble Bombay High Court)

86 ITA No. 1683/Mum./2015

87 *Income Tax Officer (International Taxation)-I, Ahmedabad* v *Cadila Healthcare Ltd.* [2017] 77 taxmann.com 309/162 ITD 575 (Ahmedabad - Trib.); *Deputy Commissioner of Income-tax (International Taxation) Ahmedabad* v *Welspun Corporation Ltd.* [2017] 77 taxmann.com 165 (Ahmedabad - Trib.)

88 *ESPN Star Sports* v *Global Broadcast News Ltd.* 2008 (38) PTC 477 (Delhi); *Akuate Internet Services (P) Ltd* v *Star India (P) Ltd.* [FAO (OS) 153/2013], *CIT* v *Delhi Race Club* (1940) Ltd [2015] 228 Taxman 185 (Delhi HC)

89 *Fox Network Group Singapore (P.) Ltd.* v *ACIT* [2020] 121 taxmann.com 330 (Delhi ITAT); *CIT* v *Delhi Race Club* (1940) Ltd [2015] 228 Taxman 185 (Delhi HC); *DDIT* v *Nimbus Communications Ltd* [2013] 32 taxmann.com 53 (Mumbai ITAT); and *ADIT* v *Neo Sports Broadcast (P.) Ltd.* [2011] 15 taxmann.com 175 (Mumbai ITAT)

90 Agrawal A, Singhal S & Sakthivel M, Ownership and transfer of 'Musical Work' and 'Sound Recording'– A case for Service Tax, *Journal of Intellectual Property Rights*, 27 (3) (2022) 227.